



U.S. Citizenship  
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Services

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File: [REDACTED] Office: TEXAS SERVICE CENTER Date:  
SRC 05 133 53199

FEB 23 2007

IN RE: Petitioner: [REDACTED]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

IN BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Mark Johnson*

2 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must “file” the complete appeal within 30 days after “service” of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on August 24, 2005. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Counsel dated the appeal September 21, 2005. On September 28, 2005, the director rejected the appeal and advised the petitioner of the new filing fee taking effect on that date. 70 Fed. Reg. 50954 (August 29, 2005). Counsel resubmitted the appeal, which the director received on October 11, 2005. At that time, counsel submitted a copy of the postal receipt for the original filing, reflecting that the appeal was originally mailed on September 26, 2005 and received on September 27, 2005.

Counsel asserts: “Pursuant to Rule 5 of the Federal Rules of Civil procedure, ‘service by mail is complete on mailing.’” Thus, counsel concludes that the appeal was timely filed on September 26, 2005 when it was mailed. “Service,” however, is not synonymous with “filing.” The regulation at 8 C.F.R. § 103.3(a)(2)(i) requires the timely *filing* of an appeal, not *service* of an appeal. The regulation at 8 C.F.R. § 103.2(a)(7) provides that an application or petition shall be stamped to show the time and date of actual receipt and, unless otherwise specified, shall be regarded as properly *filed* when so stamped. Thus, the appeal was not properly filed until received on September 27, 2005, 34 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.

**ORDER:** The appeal is rejected.